# 20240108 ART Whistleblower Submission Final.docx

[ART Logo]

Attorney-General, the Hon Mark Dreyfus KC MP

Attorney-General’s Department

3–5 National Circuit

BARTON ACT 2600

Email: PID.consultations@ag.gov.au

Dear Attorney-General,

The Accountability Roundtable is grateful for your invitation to provide a Submission on the current review of the Stage 2 reforms to the Public Interest Disclosure Act 2013. This letter and its Attachment constitute our Submission.

**ART background to this Submission.**

The Accountability Round Table (‘ART’) is a non-partisan group of citizens from diverse backgrounds (journalists, lawyers, academics, and former politicians, public servants, and judges) with extensive experience in parliament, government, administration, and the courts.

The ART group is dedicated to improving standards of accountability, transparency, ethical conduct, and democratic practice in Commonwealth and State parliaments and governments across Australia.

The ART group is animated by the idea that public office exists to serve the best interests of the people of Australia, constrained by the established limits on what is lawfully, administratively, and ethically allowable. Public office therefore involves a trust, such that the officers of government, whether elected or appointed, are duty-bound to act in the public interest, as trustees for the people.

The ART group holds that the primary means of ensuring that public officials recognise this duty is to ensure that politicians and public officials are held consistently and constantly accountable to the people. The fundamental aim of the ART group is to strengthen integrity in the practices and processes of Government, Parliament, the Public Service, and public officials generally.

Whistleblowers who expose genuine wrongdoing by officials and governments are a crucial element in ensuring effective accountability in Australia. Effective measures for encouraging and protecting disclosures of wrongdoing and enhancing public support for such measures, by law and policy, are thus a main focus of this submission.

In making this Submission, the ART group acknowledges the findings of previous Inquiries and Reviews, the various legislation enacted by other Australian Parliaments, the efforts of current and previous Members of Parliament, and the sustained contributions of scholars in Australia and overseas.

Accountability Round Table.

8th January 2024.

(Contact for correspondence: Dr Julia Thornton E: julia.m.s.thornton@gmail.com)

**Attachment 1**

# Whistleblower Accountability Issues: The Accountability Round Table position.

## SUBJECT

This submission responds to the Consultation Paper "Public sector whistleblowing reforms; Stage 2 – reducing complexity and improving the effectiveness and accessibility of protections for whistleblowers" released November 2023.

## SUMMARY

Our submission is based on two connected principles.

1. That the public is entitled to transparency on all information about government decision-making. This includes information on maladministration, corrupt practices and failures of proper conduct. To properly follow this 'right to know' approach means reversing the onus of proof from the whistleblower to the agency under scrutiny. It also means that legislation should lean towards de-restricting the type of information that can be given on suspected improper conduct and de-restricting who can give it.

2. That the primary purpose and justification for legislating for ‘Whistleblower Protection’ is (or ought to be) to encourage the disclosure of ‘wrongdoing’ so it may be remedied.

These two principles imply that the definition of disclosable conduct should not be prejudged by the Act but should be based on an assessment of the information provided as to (a) its truth and (b) its usefulness (or non-triviality) in pointing to a wrongdoing or pattern of wrongdoing.

We support the creation of an independent, statutory, over-arching ‘Whistleblower Protection Authority’ or some such, with the statutory duty to act as a clearing-house for managing (but not investigating) ‘public interest disclosures’ made pursuant to the Act.

We also support a "No wrong doors" approach as both of these initiatives will act to support a freer flow of informed and supported disclosure of possible or suspected wrongdoing.

For the same reasons we also support the suggestions made in the Consultation Paper to better protect whistleblowers from reprisal (whether or not their allegations are vindicated).

## INTRODUCTION

The Consultation Paper invites attention to the Government’s overall objective of reducing complexity and improving the effectiveness and accessibility of protections for Whistleblowers.

Accountability Roundtable endorses this as a general objective for Government, while noting that there have been numerous formal reviews and inquiries which addressed this objective in the decade since the original legislation was enacted.

The Accountability Round Table commends the actions already taken in Stage 1 of this Review and for the suggestions in the Consultation Paper for Stage 2 to improve the protection of whistleblowers from disincentives to act and from retaliation, having acted.

Even so, much work remains to be done.

The Consultation Paper indicates an interest in ‘views on what reforms are required to the PID Act … to ensure the public sector whistleblowing framework remains fit for purpose and accessible for public officials…’.

The ART considers that the PID Act 2013 has never been ‘fit for purpose’, and requires not reform but a complete reworking, if it is to achieve the overall objectives stated above.

Properly understood, the primary purpose and justification for legislating for ‘Whistleblower Protection’ (or ‘Public Interest Disclosure’, ‘Protected Disclosure’, ‘Principled Dissent’, etc) is not to provide protection against retaliation against genuine Whistleblowers, but to encourage the disclosure of ‘wrongdoing’, as defined, so it may be remedied.

Whistleblower protection is needed insofar as a lack of it is an impediment to disclosure. ‘Protection against retaliation’ is but one strategy for encouraging such disclosures.

**In the ART group’s view, which is broadly consistent with findings of the numerous reviews and inquiries undertaken since 2015, the present Act is wholly inadequate.**

**A new, simplified, and principles-based Act is required.**

## OUR SUBMISSION

Beginning with the last of the issues noted in the issues summary on page 5 of the Consultation Paper, a principles-based approach to regulation under the PID Act should start with the following principle.

## 1. Entitlement to public transparency.

Reforms to the PID Act should start from the same principle as the current FOI Act which takes the position that **the public is entitled to transparency on all information about government decision-making**.

This entitlement is based on;

1. The proposition that where a public official is entrusted with power, that person is obliged to exercise those powers for the benefit of others in the public interest.

2. Any information developed with the people's money and the power they have delegated to government is the property of the people. One needs good reasons to deny the people access to their property.

A wrongdoing therefore should not simply be understood in the traditional sense of corrupt or misleading behaviour, it should include refusing to release information that does not fall foul of one of the genuine exceptions that can be found in the FOI Act. Such refusal reduces our right to the broadest range of information to which we are entitled, and creates good incentives for whistleblowers to take action.

Accepting this argument also entails that we have an entitlement to public interest information that does **not** include wrongdoing.

A **"Right to Information"** approach [[1]](#footnote-1) **reverses the onus of proof from the present situation where, the whistleblower demonstrates that a disclosure has merit and the discloser is a proper person to make it. Instead an agency must justify why the allegation should not be investigated**.

While there are some matters of safety, personal privacy, legal or commercial privilege and security matters which are allowable exceptions to such transparency, the main difference between the two approaches lies not in differences of the principle obligation to inform the public, but in the type and source of the information.

FOI applies to information and documents which are about the usual practices of government which it is acknowledged should be available to the public and for which a process to do so is set out in legislation.

Whistleblower legislation on the other hand, responds to information which is intended to expose wrongdoing by government which it can be risky for whistleblowers to reveal. Such disclosures can often take circuitous and unusual routes in order to avoid reprisal. In this respect public interest disclosures are inherently less predictable and less amenable to institutionalisation. A single allegation may snowball into a much larger issue.

### Our position

Accountability Roundtable's position is that whether the source of information is official or unofficial, if it is legitimate information on government decision making or government behaviour in practice, and it is not a matter to which the same exceptions as apply for FOI requests, it should be in the public domain. Provision should however be made for closed reports of wrongdoing under some circumstances.

## 2. Making a disclosure within government

#### 2.1.Entitlement to report wrongdoing.

As a general principle it is much better to regulate **types of behaviour rather than types of people**.

The Consultation Paper however along with the 2013 Act, envisages two types of people: those who are entitled to whistleblower protection, and those who are not.

The distinction between two types of people is maintained in the Consultation Paper which invites comment on the issue of who can make a protected disclosure.

We commend government's extra protections for whistleblowers against reprisal and for extending those whistleblower protections to witnesses in their stage 1 reforms made in the Public Interest Disclosure Amendment (Review) Bill 2023

However, the Paper appears to restrict stage 2 responses to the issue of who ‘within government’ can make and receive disclosures.

It does not clarify reasoning why a class of people who cannot make protected disclosures have been excluded.

In our submission to the 2016 Moss Review, ART identified Ministers and their staff as missing from the coverage of the 2013 PID legislation. Political scandals over the last several years have highlighted the difficulty of whistleblowing on either the illegal activities of Ministers or those of their staff. The people most likely to do this are themselves Ministers, MPs or staffers. Subdivision A of Division 3 of Part 4 of the current Act still fails to remedy this omission. Ministers and MPs are not for the purposes of the Act, "public officials". Neither are staffers who have over a number of years usurped the functions of the public service (who are largely protected) in advising the Minister.

The Consultation Paper notes that " Individuals employed by parliamentarians under the MoP(S) Act cannot make disclosures under the PID Act" [[2]](#footnote-2) , but that the proposed Independent Parliamentary Standards Commission (IPSC) could receive complaints about breaches of the Behaviour Codes for Commonwealth Parliamentarians and staff employed under the 1984 (MoP(S) Act), and the Behaviour Standards for Commonwealth Parliamentary Workplaces.

While complaints about behaviour could be useful in protecting parliamentary staffers, the focus of the Consultation Paper mainly on protection of whistleblowers obscures the very important informational role that staffers could have in revealing wrongdoing in public office.

Similarly protected disclosure status is not extended to members of the public who may, as a party member, volunteer, or as an ordinary citizen find themselves in possession of information about Ministers, staffers or public servants which suggests that they may be failing to meet their public interest obligations.

Further, the present legislation rests on mistaken assumptions about how Whistleblowing might occur in practice. The Act assumes that a qualifying disclosure will be a discrete action by an individual, concerning a single discrete occurrence of ‘wrongdoing’, and involving a single agency. Real life is not like that, and a new Act should take the opportunity to be more flexible, principles-based, and directly relevant to the needs of whistleblowers, officials, and the public interest.

There appears to be no recognition by the current PID Act that multiple disclosures may be made separately by several individuals about the same or related matters, to separate agencies, over time. The mandatory confidentiality provisions of the Act are complex and intractable and militate against systemic overviews of unethical or illegal behaviour and co-ordinated action to stop it.

### Our position

The ART group’s general position is simple: if the policy objective of the scheme is to encourage ‘integrity in government and the public sector’ by strengthening protections for genuine whistleblowers in exposing wrongdoing, as it should be, it is a matter of common sense that the law would **permit disclosures** of wrongdoing (as defined) **to be made by any person**.

The 'Deeming provision’ set out in s.70 of the 2013 Act - "Individuals taken to be public officials", is a useful innovation in principle, effectively enabling ‘any person’ to make a disclosure. This mechanism should be retained and clarified.

Unfortunately s.70 (3A) specifically excludes;

(c) a member of Parliament; or

(d) a person employed under the Members of Parliament (Staff) Act 1984.

It is possible that these people were omitted due to concern about political motivations for false or vexatious allegations. (More about this in section 2.2.1 below.)

Additionally the s.70 discretion is unclear and incomplete in practice and unlikely to be used, not least because of institutional loyalty and/or Conflict of Interest issues. It should be clarified so as to encourage unbiassed application on the basis of uncovering the truth and gravity of any allegation of wrongdoing wherever it occurs.

#### 2.2 Whistleblowers obligations.

The advice given by the then ombudsman Colin Neave, after the introduction of the 2013 PID Act [[3]](#footnote-3) appears to still hold - that the whistleblower should have some obligation to only disclose information "... that tends to show, or that the public official reasonably believes tends to show disclosable conduct".

There are two consequences of this requirement.

First, it requires a knowledge by the whistleblower of the exact nature of "disclosable conduct", and some confidence also that they are able to correctly identify 'wrongdoing'. The practical effect of this requirement is likely to be that disclosures will be made by those who are legally trained or who have been able to obtain sound advice, or have a good deal of personal self confidence. The high bar of the requirement as it stands is likely to result in a chilling effect on disclosures.

The current Act strictures surrounding ‘Emergency Disclosures’ are particularly difficult to fathom. They are unnecessarily complex, to the point of being unintelligible: what does ‘not contrary to the public interest’ mean in practice, especially for the intending whistleblower of average education and little knowledge of government?

Second, the requirement "that the public official reasonably believes..." touches on the 'elephant' in the Act, the never quite stated and irrelevant suspicion that some whistleblowers could be acting from the wrong motives. These might be, for example, the aforementioned political motives, or the worry advanced by the Consultation Paper that any introduction of a reward system for whistleblowers could displace legal duty as a motivation with an expectation of financial reward [[4]](#footnote-4) . The assumption here being that a financial reward might encourage improper reporting behaviour that a legal duty would not.

### Our position

The ART position on disclosable conduct is not to limit the range of matters and information that can be disclosed, but to apply a threshold test to all disclosures. **The decision about what is or is not relevant information should not be made pre-emptively by the person receiving the information**.

Instead, two tests of reported allegations or of information on suspected wrongdoing would clarify rather than suppress information flows.

**2.2.1. A truth test for information legitimacy.**

We believe that a main reason for limiting protected disclosures and the information so disclosed is to guard against the risk of the 'wrong' motives for disclosure or the encouragement of lying for personal, organisational or political advantage.

There is a simple first test for acceptance of a report. It does not matter what the disclosers motivations might be. **What matters is if the revelation is, or could be true**.

**2.2.2. An efficacy test for prioritising information usefulness.**

We also believe that a second reason for shifting a good part of the value judgment about usefulness to the whistle blower could be to prevent agencies being overwhelmed by trivial complaints.

So the second test is whether or not the information is potentially useful, and to what extent. Neither of these barriers should be the task of the whistleblower. It should instead be the task of the agency to which it is reported to decide on potential veracity and usefulness after investigation.

At present the PID Act specifies that "If a disclosure is made to an authorised officer of an agency (either directly by the discloser or through a supervisor of the discloser), he or she allocates the handling of the disclosure to one or more agencies". [[5]](#footnote-5)

This mechanism opens the prospect of creating the occasional conflict of interest in addition to requiring a similarity of judgement and knowledge across all agencies so that similar complaints about different agencies are handled in the same way.

**2.2.3. No need for an external disclosures test.**

If, as we suggest, disclosures are permitted to be made by any person, and without a requirement that the information initially shows "disclosable conduct", an 'external' disclosures test becomes redundant.

In any case, the additional ‘public interest test’ which the present Act applies to ‘external’ disclosures is illogical, unnecessary, and impossible for a Whistleblower to satisfy in practice. Such a test should be wholly abandoned for any new legislation.

## 3. A new regulatory and support infrastructure.

Of equal significance to the general principles of disclosure is valuing accountability through the free flow of information outlined above. Strategies that include ensuring the processes for making a disclosure are clear, straightforward, and accessible, and which ensure that intending Whistleblowers can find expert advice and assistance if needed, are essential.

Provision of an independent, statutory, over-arching ‘Whistleblower Protection Authority’ or some such, with the statutory duty to act as a clearing-house for managing (but not investigating) ‘public interest disclosures’ made pursuant to the Act, might alleviate several difficulties and strengthen compliance with a new Act.

* It could perform the two test sorting process for assessing incoming whistleblower information and it could triage initial decisions on whether it was worth referring on to an authority to proceed with an investigation.
* It could then distribute disclosures to the right investigative body for follow-up. This would also remove the necessity for any number of "authorised officers" to independently decide on the correct agency and distribute disclosures to the right investigating agency.
* Given that multiple disclosures may be made separately by several individuals about the same or related matters, it could collate and report information on any systemic failures.
* It might act as an educative hub to improve understanding about obligations and issues pertaining to whistleblower disclosures. [[6]](#footnote-6)
* It could provide expert advice and assistance to potential whistleblowers especially those who have accidentally stumbled across an important wrongdoing that they don't feel equipped to manage.
* Such an Authority could also be empowered to make ‘Deeming’ decisions in accordance with the innovative (and potentially very useful) provisions of s.70 of the Act.
* The present Act is also deficient in not providing for discretionary rewards and incentives to be available to encourage the making of protected disclosures. The putative ‘Whistleblower Protection Authority’ could (and should) be empowered to decide on meritorious cases, within limits but at its discretion, without the need for an application.

### Our position

In principle, the ART group is **in favour of such a ‘Whistleblower Protection Authority’ function**, provided it is **independently established by legislation** which also **guarantees adequate funding on a triennial basis**.

## 4. A new reporting infrastructure.

If disclosures of wrongdoing are permitted to be made by any person, as we advise in this submission, then a “No Wrong Doors” approach, as suggested by the Consultation Paper, is essential to achieving this objective, because ordinary citizens cannot be reasonably expected to know which is the ‘right’ Department or agency to approach.

A “No Wrong Doors” approach to encourage disclosures is fundamental, and should, in our view, **be a major function of the mooted ‘Whistleblower Protection Authority’**, along with public education and reporting on the rates of usage of the Act.

### Our position

Any person who has relevant information should be enabled to make a protected disclosure at first instance to a Commonwealth agency, the Parliament ( - via an MP), the Australian Federal Police, or a regulatory authority (such as ASIC), the NACC, the Auditor-General, the ATO, or the Office of the Ombudsman.

The existing Act’s provision for any Commonwealth agency or Department head (including a delegate) to receive a Disclosure, and a requirement to refer the disclosure, ( to ‘the right door’ , via the proposed ‘Whistleblower Protection Authority’) should be retained and strengthened.

**Failure by a responsible official to comply with a duty to refer a relevant disclosure to ‘the right door’, and to the proposed ‘Whistleblower Protection Authority’, should be made a Misconduct offence.**

**By the same token, failure to investigate a relevant disclosure (including a disclosure alleging ‘retaliation’ contrary to law) should also be made a Misconduct offence.**

Disclosures to the public, via ‘mainstream’ media outlets should be restricted in the manner currently provided by the 2013 Act.

‘Disclosures’ of claimed wrongdoing made to the general public via ‘social media’ should not be protected. The definition of ‘journalist’ must be revisited, as it now has little meaning as a descriptor.

## 5. Remaining matters

The Consultation Paper invites comment on a number of essentially unrelated matters, including:

* the pathways to make a disclosure outside of government, including requirements for external disclosures,
* access to professional assistance, and
* the treatment of ‘Intelligence information’.

The ART group’s general position on these matters (as set out above) is that the primary purpose and justification for legislating for ‘Whistleblower Protection’ is (or ought to be) to encourage the disclosure of ‘wrongdoing’ so it may be remedied.

### Our position

The proposed replacement ‘Principles-based’ legislation should identify such an objective in unambiguous terms. Any administrative procedures prescribed by the proposed legislation should be consistent with and supportive of this objective.

Further, the ART group makes the following recommendations:

* An intending or potential Whistleblower should not be required to make an ‘internal’ disclosure as a first step: so-called ‘external’ disclosure (as discussed above) should always be available for use at the Whistleblower’s discretion **except where an effective Whistleblower Protection Authority has been established.**
* A range of ‘preparatory acts’ undertaken for the purpose of obtaining professional advice to assist a potential whistleblower to decide to make, or not make, a protected disclosure should be protected in the same terms as a disclosure. The range of permitted sources should be limited to legal and medical (including mental health) practitioners, unions, professional associations, and employment law specialists (such as the Fair Work Commission).
* For the avoidance of doubt, the proposed new Act should avoid the use of the language of ‘complaint’, except where a Whistleblower is dissatisfied with how their disclosure has been treated. Otherwise a ‘public interest disclosure’ (or the preferable language of ‘protected disclosure’) is unambiguous and sufficient.
* The proposed new Act should also make it clear that a genuine disclosure of wrongdoing will attract the protections provided by law, and those protections will not lapse if the disclosure, upon investigation, proves to be mistaken, unproved, or unprovable.
* The 2013 Act’s treatment of ‘Intelligence Information’ in the context of a Public Interest Disclosure is complex and confusing, even to experts. It is possible, even likely, that the fact that a given disclosure’s use of, or reference to, ‘Intelligence Information’ might not be known to the Whistleblower at the time of making their disclosure(s), or might not emerge until the disclosure is investigated. Equally, it might be well known to the discloser that Intelligence information is actually or potentially involved. Where this occurs, it is to be preferred – for security considerations at minimum – that such a disclosure be managed under separate legalisation devised for the different purposes and interests involved, rather than conflated with ‘ordinary’ whistleblowing.
* Given the ART group’s general policy position , namely that the primary purpose and justification for legislating for ‘Whistleblower Protection’ is (or ought to be) to encourage the disclosure of ‘wrongdoing’ so it may be remedied, the proposed Whistleblower Protection Authority could (and should) occupy a central role in the provision of capacity-building education and training of the whole community of public officials who are subject to the Act, together with public information and advocacy functions. This role would require collaboration with the Ombudsman, employment regulators (such as the FWC), the Public Service heads, and the various Integrity agencies.

[END]

1. Queensland Government. Right to Information Act 2009 (2009).

   https://www.legislation.qld.gov.au/view/html/inforce/current/act-2009-013. [↑](#footnote-ref-1)
2. See Consultation Paper p 10 [↑](#footnote-ref-2)
3. Speaking up about Wrongdoing: A guide to making a disclosure under the Public Interest Disclosure Act 2013. Commonwealth Ombudsman (ND) https://www.ombudsman.gov.au/\_\_data/assets/pdf\_file/0014/29030/speaking\_up\_about\_wrongdoing.pdf [↑](#footnote-ref-3)
4. See final sentence, p 18 of the Consultation Paper. [↑](#footnote-ref-4)
5. Part 3 Division 1 s 42 Simplified outline [↑](#footnote-ref-5)
6. ACT bureaucrats have 'poor understanding' of public disclosures. Lucy Bladen, Canberra Times. January 3 2024 https://www.canberratimes.com.au/story/8474474/act-public-servants-poorly-understand-public-interest-disclosure-process/ [↑](#footnote-ref-6)